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In The

Supreme Court of the United States

October Term, 1998

CECIL M. SULLIVAN, PAT SALMON & SONS, INC., TRISAL LEASING COMPANY, INC., LOUISIANA FARM BUREAU CASUALTY INSURANCE COMPANY AND LUFKIN INDUSTRIES, INC.,

Petitioners,

vs.

GENA MARIE DETILLIER,

Respondent.

On Petition For A Writ Of Certiorari To The Louisiana Court Of Appeal, Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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41 pp

QUESTION PRESENTED FOR REVIEW

1. Whether the National Traffic and Motor Safety Act ("Safety Act") and the Federal Motor Carrier Safety Act ("FMCSA") preempt an individual cause of action where Lufkin complied with and exceeded the federal regulations for bumper height.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the Louisiana Supreme Court are listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

A Writ of Certiorari is respectfully sought to review the judgment of the Louisiana Supreme Court and the Louisiana Court of Appeal finding that plaintiff's cause of action was not preempted by the Safety Act and the Federal Motor Carrier Safety Act.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court voting 4-3 to deny review appears in Appendix A.

The opinion of the Court of Appeal failing to find preemption appears in Appendix B.

The judgment of the Trial Court appears in Appendix C.

JURISDICTION

The judgment of the Louisiana Supreme Court deciding 4-3 to not review the judgment of the Court of Appeal was rendered October 16, 1998. The jurisdiction of this Court to review a decision of the Louisiana Supreme Court involving the Safety Act and the Federal Motor Carrier Safety Act is invoked under 28 U.S.C. § 1257(3).

STATUTORY PROVISIONS INVOLVED

1. 15 U.S.C. § 1392.
   National Traffic and Motor Safety Act.

2. 49 C.F.R. 393.
   Federal Motor Carrier Safety Act.

STATEMENT OF THE CASE

I.

FACTS

A. THE ACCIDENT.

On the evening of April 30, 1988, Steven Small arrived in Gramercy, Louisiana at the home of Gena Detillier's parents at approximately 9:00 p.m. Mr. Small and Ms. Detillier left Ms. Detillier's home in Mr. Small's 1985 Nissan Maxima and proceeded to the Daiquiri Shop on Veterans Boulevard in LaPlace. (Vol. 9, p. 2089). After the Daiquiri Shop, Ms. Detillier and Mr. Small went to eat dinner at Bennigan's in New Orleans. (Vol. 9, p. 2090). Upon completion of dinner, the couple went to two night-clubs, Scandals and The Galleria. (Vol. 9, p. 2090). They remained there until approximately 3:00 a.m.

After leaving The Galleria, the couple began the return trip to the home of Ms. Detillier, which was 35 miles away in Gramercy. (Vol. 8, pp. 1922, 1928).

At approximately 4:00 a.m., Mr. Cecil Sullivan was proceeding west on I-10 at 55 miles per hour when he felt a jar at the back of his trailer. (Vol. 8, p. 1750). Mr. Sullivan pulled off the road and exited his vehicle, at which time he discovered that Mr. Small had crashed his

vehicle into the rear of Mr. Sullivan's trailer. (Vol. 8, p. 1750). Mr. Sullivan immediately contacted a passing truck to call for assistance. (Vol. 8, pp. 1750-1751). Prior to the accident, Mr. Sullivan did not observe any headlights approaching his trailer. (Vol. 8, p. 1763).

B. ACCIDENT INVESTIGATION.

1. Seat Belts.

At the time of the accident, Gena Detillier was not wearing a seat belt. (Vol. 8, pp. 1757; 1875-1876).

2. Speed of the Vehicles.

The exact speed of Mr. Small's vehicle prior to the crash was estimated to be at least 65 miles per hour and as high as 85 miles per hour. (Vol. 9, pp. 1995, 2017; Vol. 10, p. 2272). At the time of the accident, Mr. Sullivan was operating his trailer at 55 miles per hour. (Vol. 8, p. 1750).

3. Fault of Cecil Sullivan.

It was determined by the investigating officer and the jury that **Cecil Sullivan was not in any way at fault in causing the accident.**

C. THE LUFKIN TRAILER.

Mr. Sullivan was operating a 1987 Model 1 18-wheel trailer manufactured by Lufkin Industries, Inc. ("Lufkin"). (Vol. 9, p. 2176). This trailer was 8 feet wide and 45 feet in length. (Vol. 9, p. 2176). **The applicable**

federal standard, 49 C.F.R. 393.86, requires the bumper to be no more than 30 inches off the ground. (49 C.F.R. 393.86(a)). **The bumper at issue was 26 inches from the ground, complying with and exceeding all federal regulations.** (Vol. 9, pp. 2210; 2225; 2292).

D. INJURIES TO GENA DETILLIER.

As a result of Mr. Small crashing his car into the trailer and as a result of Ms. Detillier being unbelted at the time of impact, Ms. Detillier suffered injuries to her face and skull, as well as a brush burn to her left foot and ankle. (Vol. 7, p. 1612).

II.

PROCEDURAL HISTORY

A. PLEADINGS

On November 16, 1988, Ms. Detillier filed suit against three defendants. Those defendants included Cecil M. Sullivan, the driver of the trailer; Pat Salmon & Sons, Inc., the owner of the trailer; and Trisal Leasing Co., the lessee of the trailer. Mr. Steven Small, the driver of the vehicle in which Ms. Detillier was a guest passenger, was not named as a defendant. (Vol. 1, p. 1).

On April 28, 1989, Ms. Detillier filed an Amended Petition naming as additional defendants Travelers Insurance Company, the uninsured motorist carrier for Mr. Detillier, and Farm Bureau Insurance Company, as the insurer for Steven Small. (Vol. 1, p. 9).

Almost four years after the accident, on July 8, 1992, Ms. Detillier filed a Second Supplemental and Amending

Petition naming Lufkin Industries, Inc. as an additional defendant. (Vol. 1, p. 225).

Plaintiff alleged that the underride protection device (ICC bumper) was inadequate which caused Ms. Detillier's injuries to be made more severe than should have normally occurred in an accident of this nature.

B. TRIAL.

Trial of this matter was held on April 24, 1995 through May 5, 1995. Plaintiff proceeded to trial against Lufkin on two design theories. The first theory alleged by plaintiff was that the trailer should have been more visible which may have prevented the accident. The Trial Court found no evidence that conspicuity played any role in the accident and dismissed this theory on Lufkin's motion for directed verdict.

Plaintiff's second theory alleged that the Lufkin bumper should have been 22 inches from the ground despite federal regulations mandating that bumpers may be 30 inches from the ground. The Lufkin bumper at issue was 26 to 27 inches from the ground.

At the conclusion of trial, the jury found Steven Small to be 49% at fault and Lufkin to be 51% at fault. (Vol. 4, p. 837). The jury awarded damages totalling $1,879,498.00 with Lufkin being cast for $939,373.23. (Vol. 5, p. 1112).

C. COURT OF APPEAL.

On May 27, 1998, the Fifth Circuit Court of Appeal failed to find federal preemption under the Safety Act or

the FMCSA. In a narrow 4-3 vote, the Louisiana Supreme Court failed to grant writs of certiorari on October 16, 1998.

REASONS FOR GRANTING WRIT OF CERTIORARI

The cause of action against Lufkin is preempted under the Safety Act and the Federal Motor Carrier Safety Act. Lufkin complied with and exceeded all federal mandated guidelines for bumper height. The requirement of Lufkin to have a 22 inch bumper is the equivalent of a state regulation which is in conflict with federal law. Additionally, to allow each state to impose separate regulations destroys national uniformity and adversely affects interstate commerce.

I. PLAINTIFF'S CAUSE OF ACTION AGAINST LUFKIN IS PREEMPTED BY FEDERAL LAW AND IN VIOLATION OF INTERSTATE COMMERCE

The 1987 Model 1 Lufkin trailer and in particular the ICC bumper attached to the trailer complied with all Federal regulations, including 49 C.F.R. 393.86. As federal law provides for the specification for the Lufkin bumper design, any state cause of action imposing different requirements is preempted by federal law.

A. THE MOTOR VEHICLE SAFETY ACT AND THE MOTOR CARRIER SAFETY ACT.

1. National Traffic and Motor Vehicle Safety Act (Safety Act).

The National Traffic and Motor Vehicle Safety Act of 1966 (the "Safety Act") was enacted by Congress in response to the "soaring rate of death and debilitation on the Nation's highways." The Safety Act sought to increase automotive safety by authorizing the promulgation of federal "motor vehicle safety standards," hereinafter referred to as "FMVSS." The FMVSS, to be written and administered by the Secretary of Transportation, were to be mandatory standards which would apply to all new motor vehicles. The delegation was broad; the new law stated only that each FMVSS "be practicable, shall meet the need for motor vehicle safety, and shall be stated in objective terms." 15 U.S.C. § 1392(a).

2. Federal Motor Carrier Safety Act (FMCSA).

In addition to the Safety Act, Congress also enacted the Motor Carrier Safety Act. 49 C.F.R. 393, et seq. (1989). This Act was similar in purpose to the Motor Vehicle Safety Act and authorized similar regulations to be adopted.

B. FMCSA REGULATIONS FOR REAR END PROTECTION.

Pursuant to the FMCSA, Regulation 393.86 was enacted which provides for rear end protection.

Paragraph A of that regulation, which was applicable to the Lufkin trailer, provides:

> Every motor vehicle, except truck-tractors, pole trailers, and vehicles engaged in driveaway-towaway operations, the date of manufacture of which is subsequent to December 31, 1952, which is so constructed that the body or the chassis assembly if without a body has a clearance at the rear end of more than 30 inches from the ground when empty, shall be provided with bumpers or devices serving similar purposes which shall be so constructed and located that:
>
> (a) The clearance between the effective bottom of the bumpers or devices and the ground shall not exceed 30 inches with the vehicle empty.

As this regulation was in place at the time Lufkin manufactured the bumper at issue and at the time of the accident, any cause of action which would impose a different requirement is preempted.

C. IMPLIED PREEMPTION.

Under the recent United States Supreme Court decision in *Freightliner Corp. v. Myrick*, 115 S.Ct. 1483 (1995), this Court must consider whether plaintiff's claim is impliedly preempted by federal law. Implied preemption can exist if:

1. The scope of the statute indicates congressional intent to occupy the field exclusively; or
2. State law is in actual conflict with federal law, which arises when:

a. Compliance with both federal and state requirements is impossible; or

b. State law is an "obstacle" to the accomplishment and execution of the full purposes and objectives of Congress.

Freightliner Corp. v. Myrick, 115 S.Ct. at 1487; *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988).

1. Judgment requiring 22 inch bumper would be equivalent to state law.

The judgments of the Louisiana courts requiring a 22-inch bumper is the equivalent of state law.

Therefore, the decision of the Court to impose a 22 inch bumper requirement, which differs from the 30 inch federal standard, should be reviewed as if it were in fact a state regulation. *Wood v. General Motors Corp., supra; San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959); *Palmer v. Ligget Group*, 825 F.2d 620 (1st Cir. 1987).

2. Judgment is in conflict with federal law.

a. Purpose and intent of FMCSA.

The purposes of the FMCSA are to promote safe operation of commercial motor vehicles and to assure increased compliance with traffic laws. 49 U.S.C. § 2501.

In enacting the FMCSA, Congress sought to enhance motor vehicle safety and provide for uniform commercial motor vehicle standards. 49 U.S.C. § 2502.

To further the Congressional findings, the Federal Highway Administration promulgated various regulations regarding parts and accessories required on commercial motor vehicles similar to the FMVSS's promulgated under the National Traffic and Motor Vehicle Safety Act. Section 393.86 was promulgated to, in part, regulate the height of bumpers not to exceed 30 inches from the ground and to provide for uniform standards. 49 U.S.C. § 2502.

b. State regulation would be in conflict with federal law.

1. Regulation would destroy uniformity.

In *Wood v. General Motors Corp., supra,* the court held that all FMVSS promulgated under the Safety Act were to be uniform national standards. The standards passed under FMVSS and particularly § 393.86 are likewise uniform national standards. A state regulation imposing different requirements would destroy the national uniformity sought by the Act.

The need for national uniformity is particularly apparent under the instant litigation. If Louisiana is allowed to impose a 22 inch bumper regulation which is not required in the other 49 states, the effect on interstate commerce would be extremely significant. All trailer manufacturers would be required to either refit their vehicles or avoid commerce in Louisiana. For this reason alone, the 22 inch bumper regulation would be in conflict with the purpose and intent of § 393.86.

2. Section 393.86 is not a minimum standard.

Although § 393.86 are "minimum" in the sense that a manufacturer may make a vehicle safer than required by federal law, the standards are not "minimum" in relation to state law. Section 1392(d) of the Safety Act provides that states are forbidden from establishing standards not "identical" to a federal standard. Thus, § 1392 preempts state standards which are either more or less stringent than the federal standard. *See Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988). The same reasoning would apply to § 393.86.

3. State regulation would impose an unreasonable burden on interstate commerce.

To allow Louisiana to impose a 22 inch bumper regulation on trailer engaged in interstate commerce would place an unreasonable burden on trailer manufacturers. Rather than complying with one national standard as Congress intended, manufacturers such as Lufkin would now be required to comply with two separate standards.

Additionally, if states are to be allowed to impose additional standards, there is no guarantee that after complying with the 22 inch standard for Louisiana, another state might impose a 20 inch standard requiring manufacturers to again remanufacture their trailers.

4. Compliance with individual state requirements would be impossible.

While on its face it may appear "possible" that a manufacturer could comply with both a state and federal regulation, it is not possible if each state is to have a separate regulation. Manufacturers would be required to continually remanufacture their trailers to comply with the latest individual state regulation which is exactly the reason Congress chose to have a national uniform regulation.

3. Recent decisions indicate Supreme Court's intentions on preemption.

In *Freightliner Corporation v. Myrick, supra,* the Supreme Court was faced with a similar situation wherein a plaintiff sued a tractor trailer manufacturer under state tort law. In particular, plaintiff alleged that the failure to include an anti-lock braking system was a defective design and rendered the vehicles defective. In *Myrick,* the Court found that the claims were not preempted on the sole basis that preemption applies only whenever a Federal Motor Vehicle Safety Standard is in effect with respect to the same aspect of performance regulated by state standards. 15 U.S.C. § 1392(d). The Court further found that **there was no express federal standard addressing stopping distances or vehicle stability for trucks and trailers.** In a footnote, the Court noted that because no federal safety standard existed, they need not reach the argument that the term "standard" in 15 U.S.C. § 1392(d) preempts only state statutes and regulations, but not common law. A plain reading of

the *Myrick* decision indicates that the Court left the door wide open for a case involving a specific federal statute.

This specific situation arose in the next related Supreme Court decision of *Hernandez-Gomez v. Leonardo*, 180 Ariz. 297, 884 P.2d 183 (1994). In *Hernandez-Gomez*, the Arizona Supreme Court was faced with the allegation that the design of the car's safety restraint system failed to adequately protect the plaintiff from a foreseeable rollover and actually enhanced her injuries. On the issue of federal preemption, Volkswagen filed a Motion for Summary Judgment arguing that the car's passive restraint system complied with federal design and performance standards and that the safety act preempted state laws so that compliance with the act insulated the manufacturer from common law liability. This motion was granted by the Trial Court.

On review, the Arizona Supreme Court found that compliance with the federal standard did not preempt state law claims. However, on appeal to the United States Supreme Court, this Court granted Volkswagen's application for writ of certiorari, vacated the decision, and remanded the case to the Arizona Supreme Court for further consideration in light of the *Myrick* decision. *Volkswagen of America, Inc. v. Hernandez-Gomez*, ___ U.S. ___, 115 S.Ct. 1819, 131 L.Ed.2d 742 (1995). While Arizona has chosen to ignore the order of this Court, the holding of this court must still be followed. *See Hernandez-Gomez v. Leonardo*, 917 P.2d 238 (Az. 1996).

It is respectfully represented that this Court has sent a clear message that compliance with federal standards preempts state law claims. Lufkin respectfully represents

that the judgment as it now stands is the equivalent of a state regulation which imposes a requirement that is in direct conflict with § 393.86. As such, plaintiff's cause of action must be preempted by federal law.

CONCLUSION

The Petition for Writ of Certiorari should be granted. Plaintiff's cause of action is preempted under federal law.

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF
THE STATE OF LOUISIANA

GENA MARIE DETILLIER

VS. NO. 98-C-1746

CECIL M. SULLIVAN, ET AL

IN RE: Lufkin Industries Inc.; – Defendant(s); Applying for Writ of Certiorari and/or Review; Parish of St. John Baptist 40th Judicial District Court Div. "A" Number 23,908; to the Court of Appeal, Fifth Circuit, Number 96-CA-0274, 96-CA-0220

October 16, 1998

Denied.

HTL
PFC
CDK
JTK

MARCUS, J. would grant the writ.
JOHNSON, J. not on panel.
VICTORY, J. would grant the writ.
TRAYLOR, J. would grant the writ.

Supreme Court of Louisiana
October 16, 1998
/s/ Theophile A. Duroncelet
Deputy Clerk of Court
For the Court

APPENDIX B

GENA MARIE DETILLIER

VERSUS

CECIL M. SULLIVAN, ET AL

NO. 96-CA-274
C/W 96-CA-220
FIFTH CIRCUIT

COURT OF APPEAL

STATE OF LOUISIANA

APPEAL FROM THE FORTIETH JUDICIAL DISTRICT COURT
PARISH OF ST. JOHN THE BAPTIST,
STATE OF LOUISIANA
NO. 23,908, DIVISION "A"
HONORABLE MADELINE JASMINE,
JUDGE PRESIDING

H. CHARLES GAUDIN
JUDGE

MAY 27, 1998

Court composed of Judges H. Charles Gaudin, Edward A. Dufresne, Jr. and Sol Gothard

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AFFIRMED IN PART,
REVERSED IN PART.

This is an appeal by two parties, Lufkin Industries, Inc. and Gena Marie Detillier, from different segments of a September 14, 1995 judgment of the 40th Judicial District Court.

This case was tried before a 12-person jury. Lufkin was found 51 per cent responsible for serious injuries sustained by Ms. Detillier in a highway accident on Interstate 10. She was a right front seat guest passenger in a 1985 Nissan Maxima automobile driven by Steven Small which ran into the rear end of a 1987 Model 1 18-wheel truck trailer manufactured by Lufkin.

Ms. Detillier alleged and proved to the jury's satisfaction that the protection device and/or the bumper on the

rear of the trailer was defective and that her injuries were enhanced because of this flaw.

Both the 18-wheeler, driven by Cecil Sullivan, and Small's auto were being driven in a westerly direction on I-10. Small was found 49 per cent negligent.

This case was tried before a St. John the Baptist jury from April 24 through May 5, 1995. Verdict was rendered on May 5th which awarded Ms. Detillier the sum of $1,879,498.00.

Several post-trial motions were heard on June 16, 1995; and on August 29, 1995, the trial judge (1) denied Lufkin's Exception of Prescription, (2) denied Ms. Detillier's motion to dismiss an intervention filed by Travelers Insurance Company, (3) set legal interest to run against Lufkin from July 7, 1992, the date it was named a defendant, and (4) ordered Lufkin to pay 51 per cent of $31,592.40 costs.

The contents of the August 29, 1995 decree were incorporated into the judgment on the jury verdict which was signed by the trial judge on September 14, 1995. From this judgment, Lufkin assigned these errors:

(1) Ms. Detillier's cause of action against Lufkin Industries, Inc. had prescribed,

(2) her cause of action against Lufkin is pre-empted by federal law and is in violation of interstate commerce,

(3) the crashworthiness doctrine may not be extended to vehicles which are not in use by a plaintiff,

(4) Ms. Detillier did not carry her burden of proof to establish that the bumper was defective or that her injuries were enhanced by the trailer bumper,

(5) the trial court erred in only apportioning 49 per cent fault to Small, and

(6) the trial court erred on the Jury Interrogatory form by requiring a finding of defect simply because an alternative design existed.

Ms. Detillier has appealed (1) the denial of the motion to dismiss Travelers and (2) the granting of legal interest from July 7, 1992 instead of from April 28, 1989, the date of judicial demand on Small's insurance carrier, Louisiana Farm Bureau Casualty Insurance Company.

For the following reasons, we affirm all parts of the September 14, 1995 judgment except those parts denying Ms. Detillier's motion to dismiss Travelers and the running of legal interest against Lufkin from July 7, 1992 instead of from April 28, 1989.

PROCEDURAL HISTORY

According to trial testimony, Small had a date with Ms. Detillier on April 30, 1988. They went from her home in Gramercy, Louisiana to New Orleans. Returning to Gramercy at approximately 3 a.m., Small was driving at least 65 miles per hour when he drove into the rear of the 18-wheeler, which had been proceeding in the same westerly direction at 55 miles per hour.

Ms. Detillier filed suit on November 16, 1988 against Sullivan; Pat Salmon & Sons, Inc., which owned the truck

trailer; and Trisal Leasing Company, the vehicle's lessee. Small was not then a named defendant but he was later named a third party defendant by Lufkin.

On April 28, 1989, a supplemental and amending petition named Travelers, the uninsured-underinsured motorist carrier for Ms. Detillier, and Louisiana Farm Bureau, Small's liability insurer, as party defendants. Farm Bureau tendered its policy limits of $10,853.27 on August 8, 1989 and was dismissed as a defendant on the second day of trial, April 25, 1995.

Lufkin was named a defendant in a second supplemental and amending petition filed on July 8, 1992.

Ms. Detillier suffered severe head, facial, foot and ankle injuries and has undergone approximately 20 surgeries including numerous crania-facial reconstructive procedures. She lost one eye and her sense of smell. The jury award included $464,498.27 for past medical expenses and $50,000.00 for anticipated future medical expenses. Her overall monetary recovery was reduced by two per cent by the jury because she had not been wearing a safety belt.

We shall first consider Lufkin's six assignments of error, then Ms. Detillier's assignments.

ASSIGNMENT NO. 1

In this assignment of error, Lufkin contends that Ms. Detillier's claims against it had prescribed because it (Lufkin) was not solidarily bound with Small or Farm Bureau; consequently, the pleading naming Lufkin, filed July 8, 1992, came too late.

In Louisiana, a suit against one solitary obligor interrupts prescription as to other solitary obligors. See *Younger v. Marshall Industries, Inc.*, 618 So.2d 866 (La. 1993), and cases cited therein.

In denying Lufkin's Exception of Prescription, the trial judge found that Lufkin and Farm Bureau *were* solitary obligors, stating:

> "At the conclusion of the trial on the merits, Lufkin Industries filed an Exception of Prescription. They argued that neither Lufkin Industries nor Steven Small, the only two parties held responsible, were sued within the prescriptive period. Louisiana Civil Code article 3463 states that 'an interruption of prescription resulting from the filing of a suit in a competent court and in the proper venue or from service of process within the prescriptive period continues as long as the suit is pending'. When Lufkin Industries was named as a defendant in the above numbered suit, Farm Bureau, the insurer of Steven Small, was a named defendant. Both Lufkin Industries and Steven Small were found liable for Gena Detillier's damages and are therefore solidarily liable. Farm Bureau is solidarily liable, based upon its contractual obligation with its insured, Steven Small. Farm Bureau and Lufkin Industries are, likewise, solidarily obligated.
>
> "Although Farm Bureau had tendered its policy limits as early as August 8, 1989, they were not released from this case by final judgment of the court. It was not until the first day of trial, that Farm Bureau was dismissed. For these reasons, the Exception of Prescription is denied."

Farm Bureau, Small's liability insurance company, was sued on April 28, 1989, which was within one year of the accident. LSA-R.S. 22:655 gives an injured party the right to proceed directly against the tortfeasor's insurer without naming the tortfeasor. Lufkin's argument that it was not solidarily liable along with Small-Farm Bureau runs contrary to the jury verdict and Louisiana's comparative negligence statutes.

Further, there is no requirement in this state, for purposes of solidarity, that a plaintiff's injuries be the result of only one precise occurrence or that each defendant be responsible for 100 per cent of the damages. Here, it seems clear from the verdict that the jurors found that Ms. Detillier's initial injuries were caused by Small's negligence and that her injuries were enhanced by the defective rear protective device on the trailer.

The naming of Farm Bureau as a party defendant interrupted prescription as far as Lufkin is concerned.

ASSIGNMENT NO. 2

Lufkin contends in this assignment of error that federal law preempts Ms. Detillier's cause of action. The only specific state or federal guideline in effect at the time of the sued-on accident was the federal regulation requiring bumpers or devices serving similar purposes to be no more than 30 inches from the ground. This requirement had been in place since 1953. While Louisiana had not passed a statute mandating a lower bumper, Lufkin argues, the jury's imposition of such a requirement nonetheless impliedly preempted plaintiff's claims. Lufkin

cites *Freightliner Corp. v. Myrick*, 115 S.Ct. 1483 (1995), which states that implied preemption can exist:

(1) if the scope of the federal statute indicates congressional intent to occupy the field exclusively,

(2) if compliance with both federal and state requirements is impossible, or

(3) if state law is an obstacle to the purposes and objectives of Congress.

Freightliner dealt with preemption under 15 U.S.C. § 1392, the preemption section within the Federal Motor Vehicle Safety Act. The 30 inch bumper requirement was part of the Federal Motor Carrier Safety Regulations, enacted under the Federal Motor Carrier Safety Act. The trial judge dismissed Lufkin's preemption contention saying:

"The language relating to preemption, relied on by Lufkin, applies to a standard promulgated under the Federal Motor Vehicle Safety Act. As shown by plaintiff, the regulation governing trailer heights falls under the Federal Motor Carrier Safety Regulations. The two may have similar provisions and intent, but they are not the same. The FMVSA contains specific language as to when preemption applies. The FMCSR does not. To the contrary, the latter was not intended to preclude states or subdivisions thereof from establishing or enforcing state or local laws relating to safety, as long as it does not prevent full compliance with the federal regulations. Therefore, preemption will not apply when compliance with both federal and local regulations is possible."

The standard proposed by Ms. Detillier's two expert witnesses is a rear bumper no more than 22 inches from

the ground. This is not, however, in direct conflict with the federal "no more than 30 inches" directive.

The Lufkin bumper in this case was 27¼ inches from the ground. The jury found that while this may not have been in conflict with the federal 30-inch measure, it was negligence nonetheless considering strong trial testimony that showed the 1953 guideline was far outdated in 1988 and that Lufkin was aware of the changes and circumstances calling for a lower bumper in the interest of highway safety. A photograph in evidence shows a trailer with the type bumper Small hit. A copy is attached to this opinion.

In any event, the federal "no more than 30 inches" regulation could not block Ms. Detillier from suing in the 40th Judicial District Court.

ASSIGNMENT NO. 3

Here, Lufkin submits that it has no duty or obligation to design a trailer's rear end so that it is safe for others to crash into and that the so-called crashworthiness doctrine applies only to vehicles being used by the person injured.

The federal "no more than 30 inches" rule was a definite attempt to protect, as much as possible, the motorist who runs into the rear of a 18-wheeler. The prevention and lessening of injuries from underride accidents has been the subject of numerous tests, studies and recommendations described by expert witnesses in this case, including Lufkin's experts.

This assignment of error has no merit. The primary issue here is not whether Lufkin had a duty to design a

reasonably safe rear protection device but whether the bumper in place on the trailer was legally defective and, if so, to what extent did it contribute to Ms. Detillier's injuries.

ASSIGNMENT NO. 4

Lufkin contends that Ms. Detillier did not satisfactorily prove that the bumper was defective or that her injuries were enhanced by the trailer bumper. A product may be unreasonably dangerous if there was an alternate, feasible way to design or maintain the product with less harmful consequences even though the product does not appear to be dangerous per se. See *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110 (La. 1986). According to *Halphen*, a plaintiff's burden in a products liability case was to prove that the harm resulted from the condition of the product, that the condition made the product unreasonably dangerous and that the condition existed at time of manufacture.

The jury heard, and no doubt was favorably impressed by, the testimony of Byron Bloch, an expert on automobile safety design and vehicle crashworthiness, and Ms. Detillier's other expert, Dr. Robert Ehrlich.

Bloch said that the Lufkin bumper, which had two vertical struts and no main diagonal reinforcement, was defective in design and unreasonably dangerous when manufactured by Lufkin. Upright automobiles in the 1950s, he said, "gave way" in the 1960s and 1970s to cars with lower frontal structures.

The Lufkin bumper, Bloch states, " . . . could not prevent the extreme underride hazard and the penetration into Gena Detillier's survival space."

Dr. Ehrlich, a West Point graduate with advanced degrees from Purdue and Michigan universities and a fellow in the Society of Automotive Engineers, was qualified as an expert in mechanical and automotive engineering, body kinematics, accident reconstruction and human engineering. He has been with Stevens Institute of Technology for 25 years and he helped develop the lunar rover vehicle. He said that the front end of the car Ms. Detillier was in went under the bumper and far underneath the trailer. "This caused," Dr. Ehrlich said, "the rear of the trailer to intrude back almost to what is called the B-post . . . the second post back which divides that front and rear doors or after the single door of a two-door car."

Because of this deep intrusion by the trailer, both Bloch and Dr. Ehrlich said the fact that Ms. Detillier was not wearing a seat belt made no difference as far as her injuries were concerned. Lufkin's experts, particularly Dan William Wall, did not agree with this. Wall, an expert in mechanical engineering employed by Cromack Engineering Associates, said that if Ms. Detillier had been wearing a seat belt, her injuries would have been less severe. She did not strike, as Dr. Ehrlich said, her head on the rear of the trailer where the two tail lights are. Wall said Ms. Detillier's head struck the windshield.

The testimony of the medical doctors, however, suggested that Ms. Detillier's face was struck by an object such as the rear of a trailer and that her injuries were not those of an unbelted passenger hitting the windshield.

Lufkin's other expert, LaVan Watts, is chief engineer of Lufkin's trailer division. His testimony pretty much agreed with Wall's although he did admit that in September of 1980 Lufkin received information from Dynamic Science saying that the under-ride guard should be no more than 20 inches from impact speeds at 30-40 miles per hour and 22 inches for speeds below 30 miles per hour. Lufkin, he said, does have one design where the guard, is 19 inches above ground. The trailer Small hit had a higher bumper.

The closing speed – i.e., the difference in speed between that of the 18-wheeler and Small's Nissan – was 10 to 15 miles per hour according to Bloch and Dr. Ehrlich but greater according to Wall, who estimated that Small was driving from 80 to 85 miles per hour.

Both Bloch and Dr. Ehrlich said that the 1953 "no more than 30 inches" guideline was obsolete long before Lufkin manufactured the trailer involved in this accident and that many national tests, surveys and recommendations pointing this out should have been well known by everyone in the trailer manufacturing industry, including Lufkin. Bloch testified that national tests and demonstrations as early as 1969 and 1970 showed that a rear-end clearance as high as 24 inches exposes a significant proportion of the vehicle population to serious underride accidents. He said that on March 3, 1969, a proposed rule suggested that rear bumpers on trailers should be no more than 18 inches from the ground.

All four experts, two for each side, testified at length under direct and cross examination. In essence, this is a case of the jury putting more belief in the opinions of Ms.

Detillier's experts. We cannot say that the jury's evaluations of credibility and references of fact are manifestly erroneous.

There are definitely two permissible views of the testimony and evidence here; consequently, the jury's choice can't be clearly wrong.

ASSIGNMENT NO. 5

The jury apportioned 49 per cent fault to Small. Lufkin contends this percentage should have been larger. Apportionment of fault, like findings and conclusions of fact, are not set aside absent manifest error.

Allotment of fault percentages in contributory negligence cases can't be determined by reference to an exact formula. A judge or jury must have considerable discretion. Only when this discretion is abused is the apportionment changed on appeal. While we agree with Lufkin to an extent and believe that Small's 49 per cent was low, we cannot say that this allotment was clearly wrong and beyond the jury's discretion.

ASSIGNMENT NO. 6

Lufkin's final assignment of error concerns the jury interrogatory form, particularly interrogatories 1, 2 and 3, which read:

(1) With respect to plaintiff's strict product liability claim against Lufkin Industries, Inc. was the Lufkin trailer unreasonably dangerous because of its design because alternative products were available to serve the

same needs or desires with less risk of harm?

(2) With respect to plaintiff's strict product liability claim against Lufkin Industries, was the Lufkin trailer unreasonably dangerous because of its design because there was a feasible way to design the product with less harmful consequences?

(3) Was such defect in design a cause, as cause has been defined for you by the Court, of any injuries or damages sustained by Gena Detillier?

The wording in these interrogatories came from *Halphen v. Johns-Manville Sales Corp.*, supra. We see no error.

DETILLIER'S ASSIGNMENTS OF ERROR

In her appeal, Ms. Detillier argues (1) that Travelers was wrongly granted recovery on its intervention claim and (2) that interest against Lufkin should commence on April 28, 1989, not July 7, 1992.

Travelers' subrogation claim was upheld by the trial judge because of language in the agreement whereby Ms. Detillier agreed:

" . . . to hold any monies received by her as a result of settlement and/or judgment in a subject lawsuit, or any other lawsuit arising as a result of the subject accident, in trust, for the Travelers Insurance Company to be paid to the Travelers Insurance Company immediately upon the same coming into her hands, provided, however, that any sum received in excess of Three Hundred Thousand Dollars ($300,000.00) shall be retained by her individually."

This runs afoul, Ms. Detillier believes, with the concept of partial subrogation and the Louisiana Supreme Court's holding in *Egros v. Pempton*, 606 So.2d 780 (La. 1992), wherein the Court stated at page 784:

"If the UM insurer pays only part of the obligation, such as when it pays to its policy limits which are less than the total amount of damages, it is partially subrogated to the insured's rights . . . If partial subrogation occurs, the insured is paid in preference to the UM insurer's right to reimbursement through subrogation, to ensure full recovery for the accident victim."

Actual wording of the subrogation agreement apparently was not an issue and was not discussed in *Egros*. We assume, however, that the language in that agreement, as likely in most if not all subrogation agreements, closely resembled the wording of the agreement signed by Ms. Detillier.

We believe that the *Egros* holding is controlling. The payment of $300,000.00 to Travelers would deny Ms. Detillier "full recovery" for the grave and lasting injuries she sustained. That section of the September 14, 1995 judgment in Travelers' favor is set aside.

Although the factual situation in *Egros* differs from those present here, the Supreme Court's definition of partial subrogation and when it applies is quite clear.

Regarding interest, Lufkin's position is that interest should run from July 8, 1992, the date of the supplemental and amending petition adding Lufkin as a defendant because there was no evidence demonstrating that Small was insured by Farm Bureau and because Lufkin and

Farm Bureau are not solidarily bound. These contentions are not accurate.

Farm Bureau filed a motion to deposit funds into the registry of the court because of its admitted insurance coverage. Also, counsel for Farm Bureau confirmed, in open court, Farm Bureau's coverage.

Lufkin was found solidarily liable along with Small/ Farm Bureau; accordingly, interest should run from April 28, 1989, the date Farm Bureau as Small's insurer, was sued.

AFFIRMED IN PART,
REVERSED IN PART.

GENA MARIE DETILLIER	NO. 96-CA-274 C/W 96-CA-220
VERSUS	FIFTH CIRCUIT
CECIL M. SULLIVAN, ET AL	COURT OF APPEAL
	STATE OF LOUISIANA

DUFRESNE, J. CONCURRING

I respectfully concur.

Although, I do not find manifest error in the jury's allocation of fault on behalf of Steven Small. I do believe that 49% is low.

APPENDIX C

FORTIETH JUDICIAL DISTRICT COURT
PARISH OF ST. JOHN THE BAPTIST
STATE OF LOUISIANA
GENA MARIE DETILLIER
VERSUS
CECIL M. SULLIVAN, ET AL

NUMBER: 23908 DIVISION "A"

FILED: _____ _____
DEPUTY CLERK

JUDGMENT

This matter came for trial on the merits pursuant to regular assignment:

PRESENT: Paul H. Due, Kirk A. Guidry, Lloyd LeBlanc, Jr. and Bernard Charbonnet, Jr., representing Gena Detillier

Stephen N. Elliott representing Lufkin Industries, Inc.

Dan R. Dorsey representing Steven Small

John C. Combe, Jr., representing Travelers Insurance Company

Evidence was adduced and the matter was submitted to the jury, which jury unanimously answered the following pertinent questions in the manner indicated:

1. With respect to plaintiff's strict product liability claim against Lufkin Industries, Inc., was the Lufkin trailer unreasonably dangerous because of its design because alternative products were available to serve the same needs or desires with less risk of harm:

   YES X NO _

2. With respect to plaintiff's strict product liability claim against Lufkin Industries, was the Lufkin trailer unreasonably dangerous because of its design because there was no feasible way to design the product with less harmful consequences?

   YES X NO _

   If your answer is "yes" to either #1 or #2, proceed to #3; if your answer is "no", proceed directly to #4.

3. Was such defect in design a cause, as cause has been defined for you by the Court, of any injuries or damages sustained by Gena Detillier?

   YES X NO _

4. Do you find that Cecil Sullivan was negligent?

   YES _ NO X

5. If you find Cecil Sullivan negligent, was such negligence a cause, as cause has been defined for you by the Court, of any injuries or damages sustained by Gena Detillier?

   YES _ NO X

6. Do you find that Steven Small was negligent?

   YES X NO _

7. If you find that Steven Small was negligent, was such negligence a cause, as cause has been defined for you by the court, of any injuries or damages sustained by Gena Detillier?

   YES X NO _

8. What is the degree of strict liability or negligence, if any, where applicable, expressed in a percentage, of each of the following:

Strict product liability of Lufkin Industries, Inc.	51 %
Negligence of Cecil Sullivan	0 %
Negligence of Steven Small	49 %
TOTAL	100 %

   (Note: The total percentage of strict liability or negligence or both must equal 100%)

9. Do you find Gena Marie Detillier was not using a safety belt at the time of the accident?

   YES X NO _

   If your answer is "yes", proceed to question #10

   If your answer is "no", answer question #11

10. State the percentage, if any, which plaintiff's damages should be reduced for the non-use of the safety belt.

(Your answer cannot be more than 2%)	2 %

11. What is the total amount of damages, if any, sustained by Gena Detillier for each of the following claims:

Past medical expenses	$464,498.27
Future medical expenses	$ 50,000.00
Past physical pain and suffering	$175,000.00
Future physical pain and suffering	$ 25,000.00
Past mental anguish	$120,000.00
Future mental anguish	$175,000.00
Past loss of enjoyment of life	$ 40,000.00
Future loss of enjoyment of life	$100,000.00
Disability	$375,000.00
Disfigurement	$300,000.00
Past loss of income	$ 25,000.00
Future loss of earning capacity	$ 30,000.00

The verdict being in the proper form and in accordance with the law and the evidence, it is therefore made the judgment of the Court.

ACCORDINGLY:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of plaintiff, Gena Marie Detillier, and against defendant, Lufkin Industries, Inc., in the full principal sum of NINE HUNDRED THIRTY-ONE THOUSAND THREE HUNDRED SEVENTY-THREE

AND 23/100 ($939,373.23) DOLLARS, with legal interest thereon from July 7, 1992 until paid.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that of the aforesaid principal sum, that intervenor, the Travelers Insurance Company be, and they are authorized hereby, to receive the sum of THREE HUNDRED THOUSAND AND NO/100 ($300,000.00) DOLLARS, with legal interest thereon from July 7, 1992 until paid with preference and priority over any additional sums to be paid under this Judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant, Lufkin Industries, Inc., be and it is hereby cast for special costs of these proceedings in the amount of SIXTEEN THOUSAND ONE HUNDRED TWELVE AND 12/100 ($16,112.12) DOLLARS, representing fifty-one (51%) percent of special costs of THIRTY-ONE THOUSAND FIVE HUNDRED NINETY-TWO AND 40/100 ($31,592.40) DOLLARS previously taxed by this Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendant, Lufkin Industries, Inc., be and is hereby further cast for fifty-one (51%) percent of the regular costs of court, in addition to the aforementioned special court costs, in the amount presently on record with the Honorable Clerk of this Court.

Judgment Rendered at Edgard, Louisiana, on this ___ day of ___, 1995.

Judgment Signed at Edgard, Louisiana, on this *14th* day of Sept., 1995.

/S/ MADELINE JASMINE
JUDGE

Supreme Court, U.S.
FILED
MAR 26 1999
OFFICE OF THE CLERK

(2)

No. 98-1366

In The

Supreme Court of the United States

October Term, 1998

CECIL M. SULLIVAN, PAT SALMON & SONS, INC., TRISAL LEASING COMPANY, INC., LOUISIANA FARM BUREAU CASUALTY INSURANCE COMPANY AND LUFKIN INDUSTRIES, INC.,

Petitioners,

vs.

GENA MARIE DETILLIER,

Respondent.

On Petition For A Writ Of Certiorari To The Louisiana Court Of Appeal, Fifth Circuit

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STATEMENT OF THE CASE

This matter arises out of an accident which occurred on April 30, 1988, while plaintiff-respondent, Gena Marie Detillier, was a guest passenger in a 1985 Nissan Maxima automobile. The vehicle in which respondent was riding rear-ended a moving 18-wheel tractor-trailer rig on Interstate Highway 10 in St. John the Baptist Parish, Louisiana. The tractor-trailer rig was owned by defendant, Trisal Leasing Company, Inc., leased by defendant, Pat Salmon & Sons, Inc., and driven by defendant, Cecil M. Sullivan.[1]

Respondent alleged in her suit that the Lufkin Industries, Inc. manufactured 1987 model trailer into which her host driver collided was defective and unreasonably dangerous due to its woefully inadequate rear bumper or underride protection device, which invaded the passenger compartment of the Nissan Maxima after impact. Because the rear bumper was too high from the ground to engage the front structures of smaller automobiles, the Nissan Maxima in which respondent was riding penetrated far underneath the trailer, which intruded into the occupancy space of the vehicle, striking respondent and essentially pulverizing her face.

Respondent sustained a brain injury, facial and skull fractures and a severe burn injury to her left foot and ankle. (R. 1786-1800). She also lost her left eye and her sense of smell. (R. 2102). The burn injury to her left foot and ankle, described as a "brush burn" by petitioner at page 4 of its petition, was actually a contact burn for

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[1] These three parties reached a settlement agreement with respondent and were dismissed prior to trial.

which she underwent several painful debridement procedures, as well as skin grafting procedures, including a complicated procedure involving the use of a vascularized skin graft from her scalp. (R. 1614-1624).

The Lufkin bumper that respondent's vehicle encountered was between twenty-six inches (R. 2210, 2225 and 2292) and twenty-seven and one-fourth inches (R. 1693) from the ground. Respondent's automotive engineering expert, Dr. Robert Ehrlich, testified that the underride guard should have been no more than twenty-two inches above the ground to prevent the type of intrusion which occurred. (R. 1981-82). Petitioner's corporate representative and chief engineer, LaVan Watts, admitted that Lufkin had an underride design with the guard nineteen inches above the ground as early as 1978. (R. 1680-82 and Exhibits P-15, 15B and 15C).

On May 5, 1995, a jury in St. John the Baptist Parish rendered a verdict finding the Lufkin trailer unreasonably dangerous, assigning Lufkin with 51 percent of the fault, and awarding total damages in the amount of $1,879,498.27 (R. 96-98). From this judgment, Lufkin appealed. The Louisiana Fifth Circuit Court of Appeal affirmed in all respects the liability findings of the trial court and also affirmed the trial court's ruling on federal preemption. Lufkin sought a Writ of Review from the

Louisiana Supreme Court, which was denied on October 16, 1998.[2]

REASONS FOR DENYING THE WRIT

Respondent's state-law tort claims are not expressly or impliedly preempted for the same ultimate reason that respondents' claims were held not preempted by this Court in *Freightliner Corp. v. Myrick*, 514 U. S. 280, 115 S.Ct. 1483, 131 L. Ed.2d 385 (1995), namely, because there was simply *no* federal regulation or standard governing underride protection devices applicable to the manufacture of the 1987 model Lufkin trailer involved in this case. There is no express preemption because, as will be shown *infra*, there was no federal standard or regulation. *Myrick, supra*, 115 S. Ct. at 1487.

As for implied preemption, this Court has recognized that a federal statute can implicitly preempt state law when:

(1) The scope of a statute indicates that Congress intended federal law to occupy a field exclusively;

(2) State law is in actual conflict with federal law;

---

[2] Because petitioner's reference, at page 6 of its petition, to the narrow 4-3 vote on the writ denial by the Louisiana Supreme Court appears to indicate that the vote was on the federal preemption issue only, respondent points out that petitioner urged federal preemption as the third of three alleged errors. The first two assignments of error concerned factual findings of the jury and alleged legal errors under Louisiana law.

(3) It is impossible for a private party to comply with both state and federal requirements; or

(4) State law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Id.*

Although the inclusion of an express preemption clause in a statute in and of itself does not foreclose the possibility of an implied preemption finding, it provides an inference that implied preemption is foreclosed. *Myrick, supra,* 115 S. Ct. at 1487-88.

Petitioner alleges that respondent's claims are impliedly preempted because they conflict with federal law. Again, however, in the absence of an applicable federal regulation or standard, there is nothing for respondent's state-law tort claims to conflict with. *Id.*

A. The Federal Motor Carrier Safety Act Does Not Apply To Manufacturers Such As Petitioner, Lufkin Industries, Inc.

Petitioner, at pages 7-8 of its petition, incorrectly asserts that 49 C.F.R. § 393.86, a Federal Motor Carrier Safety Regulation, was "applicable to the Lufkin trailer". This section was first issued in 1952 by the Bureau of Motor Carriers of the Interstate Commerce Commission (presently the Office of Motor Carriers of the Federal Highway Administration). It reads, in pertinent part, as follows:

393.86 Rear End Protection

Every motor vehicle, except truck-tractors, pole trailers, and vehicles engaged in driveaway-

> towaway operations, the date of manufacture of which is subsequent to December 31, 1952, which is so constructed that the body or the chassis assembly if without a body has a clearance at the rear end of more than 30 inches from the ground when empty, shall be provided with bumpers or devices serving similar purposes which shall be so constructed and located that: (a) The clearance between the effective bottom of the bumpers or devices and the ground shall not exceed 30 inches with the vehicle empty;

This regulation was issued pursuant to authority granted in 49 U.S.C. § 2505 (now 49 U.S.C. § 31136) which is contained in chapter 311 of title 49, entitled "Commercial Motor Vehicle Safety". The Federal Motor Carrier Safety Regulations ("FMCSR") issued pursuant thereto are contained in Subchapter B of Chapter III of Subtitle B of Title 49 of the Code of Federal Regulations. Part 390 thereof establishes the "general applicability, definitions, general requirements and information as they pertain to persons subject to this Chapter". 49 C.F.R. § 390.1.

FMCSR 390.3, establishing general applicability, provides, in pertinent part:

> (a) The rules in Subchapter B of this chapter are applicable to all employers, employees, and commercial motor vehicles, which transport property or passengers in interstate commerce.

FMCSR 390.5 defines "employer" as meaning:

> Any person engaged in a business affecting interstate commerce who owns or leases a commercial motor vehicle in connection with that business, or assigns employees to operate it, but such terms do not include the United States, any

> State, any political subdivision of a State, or an agency established under a compact between States approved by the Congress of the United States.

The term "motor carrier" is also defined therein as:

> A for-hire motor carrier or a private motor carrier. The term includes a motor carrier's agents, officers and representatives as well as employees responsible for hiring, supervising, training, assigning, or dispatching of drivers and employees concerned with the installation, inspection, and maintenance of motor vehicle equipment and/or accessories. For purposes of subchapter B, this definition includes the terms employer, and exempt motor carrier.

FMCSR 393.1 provides for the scope of the rules contained in Part 393, which part includes the FMCSR 393.86 quoted above. It provides:

> Every employer and employee shall comply and be conversant with the requirements and specifications of this part. No employer shall operate a commercial motor vehicle, or cause or permit it to be operated, unless it is equipped in accordance with the requirements and specifications of this part.

Petitioner is neither an "employer" nor a "motor carrier" for purposes of applicability of the Federal Motor Carrier Safety Regulations to it. Petitioner is a truck trailer manufacturer. (R. 225, 251).

The non-applicability of Federal Motor Carrier Safety Regulations to truck manufacturers is well established:

> The ICC [Interstate Commerce Commission which originally issued 49 C.F.R. 393.86] did not

> have authority to regulate vehicle and component manufacturers when it issued the first rear underride protection requirements in 1952 and, consequently, had no authority to compel manufacturers to provide technical data on their products. 63 Fed. Reg. 26759, 26762 (1998).

The cited Federal Register entry is a Proposed Rule to amend FMCSR 393.86 to, among other things, lower the clearance from 30 inches down to 22 inches above the ground, as was suggested by respondent's expert, Dr. Ehrlich, at trial. This Proposed Rule, if adopted as a regulation, will be a companion to two Federal Motor Vehicle Safety Standards, to be discussed, *infra*, which went into effect on January 24, 1996, specifying, for the first time, underride protection clearance requirements applicable to *manufacturers* such as petitioner herein.

The available jurisprudence also supports the conclusion that Federal Motor Carrier Safety Regulations are not applicable to manufacturers. See, e.g., *Hagan v. Gemstate Mfg., Inc.*, 148 Or. App. 192, 195, 939 P.2d. 141, 143 (Or. App. 1997) ("These rules [49 C.F.R. § 393.86 and related rules] do not directly regulate vehicle manufacturers"); *Mottu v. Navistar Int'l Trans. Corp.*, 804 S.W. 2d 144, 147 (Tex. App. 14th Dist. 1990) ("It is clear that the Interstate Commerce Act and its associated federal regulations were intended to govern transportation of passengers and property. We find no indication that the statute or the rules are applicable to manufacturers of the vehicles used for that transportation; therefore, section 393.86 [49 C.F.R.] is not applicable to appellee or the matters at issue during the trial").

FMCSR 393.86 was discussed frequently at trial, by petitioner in an effort to establish the 30 inch clearance requirement as the appropriate standard of care, and by respondent, to point out that the 43 year old regulation was seriously outdated given the subsequent development of smaller vehicles which easily underrode the rear ends of tractor-trailers. Petitioner never claimed to be a motor carrier, much less offered any evidence tending to establish the same. In its petition to this Court, Lufkin has offers absolutely no support for its assertion that FMCSR 393.86 was applicable to it as a manufacturer when it built the trailer involved in this accident. This is because none exists. Hence, petitioner has not borne its burden of establishing preemption by the Federal Motor Carrier Safety Act or its regulations.

Even assuming, *arguendo*, that petitioner, although a manufacturer and not a motor carrier, was legally required to comply with FMCSR 393.86 at the time it built the 1987 Lufkin trailer involved herein, respondent's claim would still not be expressly or impliedly preempted. Any preemptive effect of FMCSR 393.86 would be governed by the Federal Motor Carrier Safety Act. Considering the Congressional intent behind this Act, the U.S. Fourth Circuit Court of Appeals held:

> Unquestionably, these Sections demonstrate, not only that Congress did not intend to occupy completely the field of safety regulations for the operation on interstate highways of commercial vehicles but also that it contemplated the continued application and enforcement of State rules or regulations which might not be inconsistent or "incompatible" with federal regulations. In effect, *Congress intended an accommodation with*

> *state regulation so long as that could be achieved without violating federal law or valid federal regulation.*
>
> *Special Carriers & Rigging Ass'n v. Virginia*, 795 F.2d 1152, 1156 (4th Cir.1986) (Emphasis added).

This utter lack of preemptive intent is reflected in the regulations themselves. The rule relative to the preemptive effect of Federal Motor Carrier Safety Regulations provides as follows:

> Except as otherwise specifically indicated, subchapter B of this chapter [i.e., Federal Motor Carrier Safety Regulations] is **not** intended to preclude States or subdivisions thereof from establishing or enforcing State or local laws relating to safety, the compliance with which would not prevent full compliance with these regulations by the person subject thereto.
>
> 49 C.F.R. § 390.9 (Emphasis added).

And the part governing parts and accessories, which includes the regulation in dispute herein, states:

> Nothing contained in this subchapter shall be construed to prohibit the use of additional equipment and accessories, not inconsistent with or prohibited by this subchapter, provided such equipment and accessories do not decrease the safety of operation of the motor vehicles on which they are used.
>
> 49 C.F.R. § 393.3.

The test provided for preemption is simply whether the proposed state rule would "prevent full compliance" with the federal regulation. The preemption doctrine has

its roots in the Supremacy Clause of the U.S.Const. art. VI, cl. 2, which invalidates state laws that "interfere with, or are contrary to" federal law. *Hillsborough County v. Automated Medical Lab., Inc.*, 471 U.S. 707, 712, 105 S.Ct. 2371, 2375 (1985). The standard proposed by respondent's expert is a bumper no higher than twenty-two inches. Because twenty-two is less than thirty, this would not hinder compliance with the federal regulation that requires that "[t]he clearance between the effective bottom of the bumpers or devices and the ground shall not *exceed* 30 inches with the vehicle empty." 49 C.F.R. § 393.86(a) (Emphasis added). Lufkin's argument to the contrary is illogical and wrong; the federal regulation does not preempt respondent's state tort law claims.

This is not the first time that a court has been called upon to address 49 C.F.R. § 393.86's preemptive effect. In *Garcia v. Rivera*, 541 N.Y.S. 2d 880 (N.Y. Sup. 1989), *rev'd on other grounds*, 553 N.Y.S. 2d 378 (N.Y.A.D. 1 Dept. 1990), *appeal denied*, 567 N.E. 2d 980, 566 N.Y.S. 2d 586 (N.Y. 1991), plaintiff was injured when his automobile under-rode a van trailer. The Court was faced with an implied preemption argument. The defendant analogized to several preemption cases regarding the National Traffic and Motor Vehicle Safety Act. The *Garcia* Court rejected this preemption analogy because 49 C.F.R. § 393.86 is not a Motor Vehicle Safety Regulation. The Court's analysis is correct in its entirety:

> [A]nalogies have their limitations. What is implicated here is the Motor Carrier Safety Act, the enabling legislation which from its outset has proceeded from an assumption of competing state regulations. For example, in section

206(c)(2) of the Motor Carrier Safety Act, as amended in 1984, the Secretary was directed before issuing any regulations, to "consider . . . (B) State laws and regulations pertaining to commercial motor vehicle safety in order to minimize unnecessary preemption of said State laws and regulations under the Act."

* * *

"Unquestionably. . . . Congress did not intend to occupy completely the field of safety regulations for the operation on interstate highways of commercial vehicles but also that it contemplated the continued application of State rules or regulations which might not be inconsistent or 'incompatible' with Federal regulations. In effect, Congress intended an accommodation with state regulations so long as that could be achieved without violating Federal law or valid Federal regulation." *Specialized Carriers & Rigging Assoc. v. Commonwealth of Virginia*, 795 F.2d 1152, 1156 (4th Cir. [1986]).

* * *

"Whatever compensation standard a state imposes, whether it be negligence or strict liability, a licensee remains free to continue operating under Federal standards and to pay for the injury that results." *Silkwood [v. Kerr-McGee]*, 464 U.S. [238,] 264, 104 S.Ct. [615,] 629-30 [(1984)] (Blackmun, J., dissenting).

The Court moreover finds that state tort liability does not jeopardize the effectiveness of the Federal regulation, nor is there an impossibility of compliance with both Federal regulation and state common law standards of care. In the area of health and safety regulations, this

> Court is obliged to apply a presumption against preemption. [citation omitted]. Moreover, [defendant] cannot validly maintain that the purposes of the Act are undermined by state tort actions, as it is clear that the regulations are meant to be minimum standards, and not preemptive in effect.
>
> *Garcia*, 541 N.Y.S. 2d at 885-86.

Lufkin cites no authority in support of the argument that an unreasonable burden will be placed on trailer manufacturers. *Garcia* also addressed this point, holding:

> As to the alleged varying standards argument, no authority has been cited in support of the proposition that a jury finding that an ICC bumper that complied minimal [sic] with the minimal regulation, 49 CFR 397.86 [sic; 393.86], was nonetheless defectively designed, would thereby disrupt Federal efforts to ensure uniform safe design standards. If anything, the intention of the Federal agency appears to have been to encourage manufacturers to surpass the mandated Federal regulations, not use them as a shield against lawsuits.
>
> *Id.* at 887.

Thus, the Federal Motor Carrier Safety Act does not preempt respondent's claims because it does not apply to petitioner. Even assuming, *arguendo*, that it did, given the stated regulatory intent not to preempt when compliance with state requirements would not prevent full compliance with federal regulations, and given the fact that the compliance standard advocated at trial by respondent would not hinder compliance with the federal regulation,

petitioner has not borne its burden of establishing preemption on the merits by the provisions of the Federal Motor Carrier Safety Act.

B. Respondent's State Law Tort Claims Are Not Preempted By The National Traffic And Motor Vehicle Safety Act Of 1966 ("Safety Act").

Petitioner asserts respondent's claims are preempted by the Safety Act although, again, it offers no valid legal basis whatsoever in support of its assertion. The preemptive effect of the Safety Act is governed by its preemption provision which provides, in pertinent part:

> *Whenever a Federal motor vehicle safety standard established under this subchapter is in effect,* no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the *same aspect of performance* of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. 15 U.S.C. § 1392(d). (Emphasis added).[3]

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[3] 15 U.S.C. § 1397(k) provides: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." Respondent, out of an abundance of caution, asserts that this "savings clause" does not permit petitioner to use a federal safety standard to immunize itself from state common-law liability. However, because no federal safety

In this case, there was no relevant motor vehicle safety standard in effect under the Safety Act when the subject trailer was manufactured by Lufkin in 1987. Pursuant to the authority granted in the Safety Act, the National Highway Traffic Safety Administration ("NHTSA") established "Federal Motor Vehicle Safety Standards" (FMVSS), located at 49 C.F.R. § 571.1 – 571.302. These standards, which, unlike the Federal Motor Carrier Safety Regulations, do in fact apply to vehicle manufacturers such as petitioner, cover myriad safety devices on vehicles ranging from roof crush resistance requirements to tires. However, there was absolutely no safety standard in effect in 1987 under the Safety Act applicable to the rear truck underride "aspect of performance" of a vehicle such as the trailer manufactured by petitioner herein.

Petitioner therefore cannot and does not point to any safety standard in effect under the Safety Act as being non-identical to respondent's tort law claims which would then be preempted. Instead, petitioner makes the quantum leap over to the Federal Motor Carrier Safety Regulations, specifically, FMCSR 393.86, alleging that its "shall not exceed 30 inches" provision preempts the 22 inch clearance advocated by respondent at trial because the two are not identical, in alleged violation of the mandate of the *Safety Act's* preemption provision, 15 U.S.C. § 1392(d). Petitioner's effort to mix "apples with oranges" is expressly foreclosed by the language of

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standard exists, there will in all likelihood be no occasion for this Court to reach this argument. See, e. g. *Myrick, supra*, 115 S. Ct. at 1487, n. 3.

§ 1392(d) itself: FMCSR 393.86 is not a "Federal motor vehicle safety standard established under this Subchapter". Hence, § 1392(d) extends no preemptive reach to respondent's common-law tort claims. FMCSR 393.86, as shown *supra*, does not apply to petitioner's trailer manufacturing business and, in any event, does not supply any basis for preemption under the Federal Motor Carrier Safety Act preemption provisions.

On January 24, 1996, NHTSA issued a Final Rule establishing two federal motor vehicle safety standards, 49 C.F.R. § 571.223 and 49 C.F.R. § 571.224, which, for the *first* time, imposed specific "rear end impact guard" requirements on truck and trailer manufacturers. 61 Fed. Reg. 2004 (1996). This Final Rule establishing the two new standards became effective on January 26, 1998. *Id.* The two new standards provide for, among other things, strength and energy absorption criteria for new rear underride guards. Also, safety standard 224 provides for a maximum vertical distance between the guard and the ground of 560 mm (22 inches), the same maximum clearance suggested by respondent's expert at trial. These two new safety standards will obviously be subject to the Safety Act preemption statute, although the Final Rule establishing them indicates that they do not have any retroactive effect. *Id.* at 2030.

Of particular import to the preemption issues in the case at bar is the discussion contained in the required Federalism analysis in the Final Rule at 61 Fed. Reg. 2029-30:

> Based on available information, the agency believes the federalism implications of this

> rulemaking are minimal. Nearly all states require underride protection guards for heavy trailers and semitrailers. Further, most states require that the guards meet certain configuration requirements, or that they be positioned in a certain location relative to the rear and sides of the vehicle. The rule will preempt State requirements for rear impact protection. However, the agency believes that federalism implications will be minor because the guards required by this rulemaking are not fundamentally different from those required by state law.
>
> * * *
>
> For practical purposes, the only effect that this rulemaking would have in these States is to require the guards to be tested and certified for strength and energy absorption.
>
> * * *
>
> This Federal rulemaking applies uniformly to all manufacturers and will insure that the competitive position of the manufacturers will not be significantly affected by these safety improvements.

Respondent respectfully submits that the above passage provides compelling evidence for the non-preemptive intent regarding rear underride guards existing prior to the promulgation of this Final Rule in 1996. Further, because vehicles manufactured after the effective date of these new safety standards, and in compliance therewith, will be shielded by the preemptive effect of these standards from any State requirements regarding underride protection devices which are not identical, the universe of

potential state common-law claims such as the present one alleging defective design of rear underride devices due to excessive clearance is finite and established. For this additional reason, respondent respectfully submits the concerns urged by petitioners, such as the need for uniformity, do not warrant this Court's attention.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted:

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